



ASSOCIATION OF
AMERICAN RAILROADS

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November 23, 2010

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 646 (Sub-No.3), Waybill Data Released in Three-Benchmark Rail Rate Proceedings

Dear Ms. Brown:

Pursuant to the Board's Notice of Proposed Rulemaking served October 22, 2010, attached please find the comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 646 (Sub-No. 3)

WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE
PROCEEDINGS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Dated: November 23, 2010

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 646 (Sub-No. 3)

WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE PROCEEDINGS

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Introduction

In a Notice of Proposed Rulemaking (“NPR”) served October 22, 2010 in the above proceeding, the Surface Transportation Board (“Board”) “republish[ed] its April 2, 2010 proposal to amend its rules with respect to the Three-Benchmark methodology used to adjudicate simplified rate case complaints,” to include a “discussion of its rationale and regulatory objectives.” Notice at 1. The republication was undertaken by the Board because “some commenters expressed concern that the Board did not provide the rationales and regulatory objectives behind the proposed rules” in its previous NPR.¹ *Id* at 3. The rules proposed in the republished NPR “are identical to those proposed on April 2, 2010.” *Id*.

The republished NPR (as in the April 2, 2010 NPR) would provide for the release to the parties to a Three-Benchmark proceeding of the unmasked Waybill Sample data of the defendant carrier for the four years that correspond with the most recently published Revenue Shortfall

¹ The Association of American Railroads (“AAR”) was one of the parties that objected to the Board’s previous notice for, *inter alia*, failure to state the Board’s rationale and regulatory objectives behind the proposed rules. See May 3, 2010 AAR Comments; June 1, 2010 AAR Reply Comments.

Allocation Method (RSAM) figures.² The NPR (as in the April 2, 2010 NPR) would also permit the parties to draw their proposed comparison groups in any combination they choose from all four years of the released Waybill Sample data. NPR at 1, 3. The NPR (as in the April 2, 2010 NPR) sought comment (or additional input) concerning “the amount of data that would be available under the proposed rule, and the proposal that the parties would be permitted to draw from all 4 years of waybill data to form their comparison groups.” NPR at 1.

The AAR, on behalf of its member railroads, hereby submits these comments in response to the republished NPR. In its Notice, the Board stated that it would consider the comments and replies already submitted in this proceeding. NPR at 3. Because the Board’s “discussion of its rationale and regulatory objectives” in the republished NPR did not address the AAR’s previous arguments against adoption of the Board’s proposals, the AAR’s additional comments herein will essentially summarize and reemphasize its previously detailed reasons why the Board’s proposals to require the parties to choose from four years of stale Waybill Sample data should not be adopted and why there are far better alternatives than the proposed rules available to enhance the amount and probative value of the “comparison group” data used in Three Benchmark rate cases for purposes of determining rate reasonableness—which goals should be the ultimate objectives of any rules adopted by the Board in this proceeding.

Discussion

The Board’s “discussion of its rationale and regulatory objectives” sets forth various formulations of reasons for the proposed rules. See NPR at 3. None of the reasons proffered by

² The most recent RSAM and R/VC>180 ratio calculations were released by the Board in STB Ex Parte No. 689, *Simplified Standards for Rail Rate Cases—2008 RSAM and R/VC>180 Calculations* (served July 27, 2010) and cover the four-year period 2005-2008. The most recent Waybill Sample data currently available, however, is for the year 2009.

the Board is sufficient to justify the proposed rules. Indeed, nowhere in the Board's NPR is there a mention or a discussion of the readily available alternatives to the Board's proposed rules that the AAR believes would far better serve to enhance the efficacy and probative value of the "comparable movements" data used in Three Benchmark rate cases for purposes of determining rate reasonableness. The deficiencies in the Board's stated rationale for the proposed rules (and the AAR's suggested alternatives to the Board's proposals) are addressed *seriatim* below.

1. **Board NPR Statement:** The proposed rules are consistent with the Board's use of a four-year averaging period for the RSAM and R/VC_{>180} benchmarks in order to "smooth out annual variations" and "minimize the impact of aberrational data." NPR at 3.

AAR Response: The Board's use of a four-year averaging period for purposes of calculating the RSAM and R/VC_{>180} benchmarks in a Three Benchmark rate case should have no relation to the appropriate time period to be used for the calculation of the R/VC_{COMP} benchmark. The two sets of benchmarks serve entirely different purposes in a Three Benchmark proceeding. The RSAM and R/VC_{>180} benchmarks serve as overall indicators of railroad health and pricing in the short term. Because the STB has a statutory mandate to allow "rail carriers to earn adequate revenues" (49 U.S.C. § 10101 (3); 49 U.S.C. § 10704 (a) (2)) those measures look at a short history to smooth fluctuations in revenues from one year to the next so that the short-term financial health of the carrier is not judged by any single year. See June 1, 2010 AAR Reply Comments at 7-8.

The R/VC_{COMP} benchmark, however, is intended to reflect the specific demand and other operational and market characteristics of the *challenged movement itself using the comparison group of traffic as a proxy*. For this purpose, the most accurate comparison group for

the issue traffic that could be selected for the R/VC COMP benchmark would be the same commodity, moving the same distances, in the same equipment and *under the same or similar market conditions*.³ Such criteria will most accurately be met by the use of the defendant carrier's most recent traffic data for the same or similar commodities, which data would include far more comparable movements of probative value than four years of Waybill Sample data pre-dating the challenged traffic movement by up to five-to-six years and comprising a small sample of commodity movements generally having no relevance to the traffic at issue. See June 1, 2010 AAR Reply Comments at 8-10.

For selection of the R/VC COMP benchmark, accordingly, there is no need for the Board to "smooth out" four years of Waybill Sample data for any purpose or to use four years of Waybill Sample data for any purpose. If the Board's objective is to be consistent with the stated purpose of the R/VC COMP benchmark, the simplest and most rational course of action yielding the most probative comparable movement data is to permit a shipper representative, on a case-by-case basis, in a Three Benchmark proceeding (under the strict confidentiality protections currently in place) to make "a reasonably tailored request for comparable movements from the defendant carrier's own traffic tapes." This is indeed an option the Board recognized (albeit limited to what it called "unique movements") in its *Simplified Standards* rulemaking decision itself.⁴ There is no reason why this option could not be applied in *all* Three Benchmark rate cases to *all* challenged movements or why the Board should fail to even discuss it in either the April 2, 2010 NPR or in the republished NPR.

³ See *Simplified Standards for Rail Rate Cases*, STB Docket No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) ("*Simplified Standards*"), Slip op. at 18 ("The Board will... select the comparison group that it concludes is most similar in the aggregate to the issue movements").

⁴ *Simplified Standards*, Slip op. at 83.

2. **Board Statement:** “The availability of 4 years of Waybill Sample data would allow parties more flexibility to choose a comparison group that is a reasonable reflection of the traffic at issue and to avoid data that is aberrational.” NPR at 3.

AAR Response: Requiring the parties to choose a comparison group from four years of stale Waybill Sample data would not be an effective means of providing the parties an opportunity to select a comparison group that is a “reasonable reflection of the traffic at issue.” Use of four years of Waybill Sample data would be counterproductive because it would limit the parties to choosing comparable traffic groups from a data pool that is from two to up to six years old, generally consists of data from non-comparable commodity movements, and is highly unlikely to reflect the current market and operational conditions pertaining to the challenged traffic. See June 1, 2010 AAR Reply Comments at 8-11.

Moreover, if the parties were permitted to select comparison groups from the defendant carrier’s most recent traffic data tapes (as proposed by the AAR), there would be no issue of “aberrational data”. A carrier’s data tapes would include *all* movements of the challenged commodity (or comparable commodity group) and reflect current market conditions under which the challenged traffic moves.⁵ On the other hand, the Board’s proposal would increase the likelihood that “aberrational” data would be used in Three Benchmark proceedings. Reliance on four years of Waybill Sample data reaching back five-to-six years is highly unlikely to produce comparable groups of probative value and would have little or no economic rationale in the context of current market conditions. Use of such data would accordingly “increase[e] the ‘likelihood of distorted comparisons and results.’” See *CSX Transp., Inc. v. STB*, 584 F.3d 1076,

⁵ AAR members, however, reserve their right to argue in individual Three Benchmark cases that only shipments of the same commodity (e.g., the same TIH commodity) are suitable for inclusion in a comparison group. See May 3, 2010 AAR Comments at 6, n. 4).

1083 (D.C. Cir. 2009) (“*CSX Transp. II*”). See May 3, 2010 AAR Comments at 4; June 1, 2010 AAR Reply Comments at 10-11.

3. **Board Statement:** “Giving the option to choose movements over a multi-year period would provide the parties with more data from which to choose, which should assist the parties in selecting a comparison group that more closely resembles the issue traffic.” NPR at 3.

AAR Response: For the same reasons noted above, limiting the parties to a data pool consisting of four years of stale Waybill Sample data is highly unlikely to provide the parties to a Three Benchmark proceeding with “comparable group” traffic data of probative value in determining the rate reasonableness of a specific challenged commodity movement under the same or similar market and operational conditions. There are far better alternatives readily available to the Board to provide parties to a Three Benchmark proceeding with more useful, probative data for selecting “comparable group” traffic movements and the Board has a duty to examine those alternatives in this proceeding. See June 1, 2010 AAR Reply Comments at 11-14.

4. **Board Statement:** “Limiting the pool of data to the 4 years that correspond with the most recently published RSAM figures would prevent the use of data that are too old to be reliable.” NPR at 3.

AAR Response: The Board’s proposal would itself allow the use of data that also could be “too old to be reliable.” To allow parties to a Three Benchmark proceeding to have free rein to use five-to-six year old data to challenge a carrier’s current rate would have little or no economic rationale in the context of current market conditions. See *CSX Transp. II*, *supra*.

5. **Board Statement:** “A shorter period, such as the 1-year time span envisioned earlier, could cause the comparison groups to be too small.” NPR at 3.

AAR Response: As discussed above, use of a defendant carrier’s most recent traffic data for the same or similar commodity movements would produce far more “comparable group” movements of probative value than use of four years of stale Waybill Sample data that include only a small fraction of movements of the same or similar commodity as the challenged traffic. Indeed, the Board itself has acknowledged that use of four years of Waybill Sample data in Three Benchmark proceedings does not resolve the “data insufficiency” issue.⁶ Moreover, to address such Waybill Sample “data insufficiency” problems, the Board has itself recognized two alternative solutions that (standing alone or in combination) would far better address the problem.

First, as noted above, the Board itself has specifically proposed the option of using a defendant carrier’s traffic tapes on a case-by-case basis where there is a potential Waybill Sample data insufficiency problem for specific traffic. See *Simplified Standards*, Slip op. at 83. The applicability of this option can simply be expanded to include *all* challenged movements in Three Benchmark cases.

Second, in Ex Parte No. 385 (Sub-No. 7), *Waybill Data Reporting for Toxic Inhalation Hazards* (served January 28, 2010), the Board proposed to expand the TIH Waybill Sample to include all TIH traffic movements (commencing with the January 2011 Waybill Sample collection) to address what the Board perceived as an inadequate sample size for TIH traffic

⁶ See *US Magnesium L.L.C. v. Union Pacific Railroad Company*, STB Docket No. 42114 (served Jan. 28, 2010) (“*US Magnesium*”), appeal docketed, No. 10-1019, *Union Pacific Railroad Company v. Surface Transportation Board* (D.C. Cir. Feb. 2, 2010).

available from four years' worth of Waybill Sample data.⁷ Although the Board has yet to act on its rulemaking proposal, the agency should not completely ignore the option of expanding the statistical Waybill Sample to provide more current information on TIH (and other potentially challengeable traffic under the Three Benchmark methodology) and to allow the parties to use the most recent Waybill Sample for the purpose of selecting comparable traffic groups.⁸

Both alternative options noted by the Board (or a combination of the two) are far better than the Board's NPR proposals for making sufficient probative evidence available in Three Benchmark proceedings, and the Board must fully consider them in this proceeding. See May 3, 2010 AAR Comments at 4-6; June 1, 2010 AAR Reply Comments at 11-14.

Conclusion

The Board should not adopt the NPR proposals. In engaging in a *bona fide* reevaluation of its prior rules as required under the Court's ruling and the Administrative Procedure Act,⁹ the

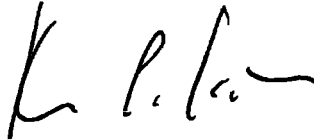
⁷ See *U.S. Magnesium*, supra. The AAR responded to the Board's proposal for use of expanded TIH waybill data by proposing that, consistent with the need for strict confidentiality protections for sensitive security information pertaining to TIH movements, a far better solution (and comparable to the Board's case-by-case suggestion in *Simplified Standards*) would be for a railroad defendant in a Three Benchmark proceeding to simply make available for use by the parties all of its TIH waybills for the most current period.

⁸ As a general proposition, if the Three Benchmark test were to be solely limited to Waybill Sample data, the most current Waybill Sample data available (which is one-to-two years old) would be far more likely than five-to-six year old Waybill Sample data to reflect current market conditions and should be preferred by the Board over older data because it is far more likely to produce more meaningful maximum rate reasonableness determinations reflecting current market conditions.

⁹ See *CSX Transp. II*; see also 5 U.S.C. § 706 (court shall set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

Board must at a minimum also take into account the other clearly available, and potentially far more efficacious, options for the parties to obtain current, useful waybill data for selecting comparison groups in Three Benchmark proceedings.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "L. P. Warchot", with a stylized flourish at the end.

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